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IN THE COURT OF APPEALS OF INDIANA

ROBERT HICKS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0709-CR-527
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia Gifford, Judge
Cause No. 49G04-0606-FA-100746

April 23, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Robert Hicks appeals his convictions, following a jury trial, of four counts of Class A Felony Child Molestation,[1] one count of Class C Felony Child Molestation,[2] one count of Class D Felony Sexual Battery,[3] one count of Class D Felony Intimidation,[4] and one count of Class D Felony Neglect of a Dependent.[5] Specifically, Hicks challenges whether there was sufficient evidence to support his conviction for neglect of a dependent and whether there was sufficient evidence under the incredible dubiosity rule to support all of his convictions. Concluding that the evidence was sufficient to support Hicks's convictions, we affirm.

FACTS AND PROCEDURAL HISTORY

T.C. Sr. has two children, T.C. Jr. and C.C. T.C. Jr. was born on April 5, 1990, and C.C. was born on August 27, 1992. During the summer of 2001, T.C. Sr. married Hicks's mother, Terry Maddox, but they subsequently divorced in late 2003. After T.C. Sr. and his mother's divorce, Hicks continued to live with T.C. Sr. until mid-August 2004.

During the summer of 2004, T.C. Sr.'s mother was hospitalized for an extended period of time while fighting brain cancer and ultimately passed away on October 24,

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[1] Ind. Code § 35-42-4-3 (2004).

[2] Ind. Code § 35-42-4-3.

[3] Ind. Code § 35-42-4-8 (2004).

[4] Ind. Code § 35-45-2-1 (2004).

[5] Ind. Code § 35-46-1-4 (2004).

2004. During his mother's hospitalization, T.C. Sr. and his siblings stayed at the hospital with their mother on a rotating basis. Because he worked during the day, T.C. Sr. often stayed with his mother during the overnight hours for approximately four hours at a time. While at the hospital, T.C. Sr. left his children in Hicks's care. At the time, Hicks was approximately twenty-one years old, T.C. Jr. was fourteen years old, and C.C. was eleven years old. Hicks was approximately six feet, three inches tall and weighed approximately 265 pounds.

One night, after T.C. Sr. had left to go to the hospital, C.C. was lying in her bedroom when she heard an increase in the volume on her brother's television. C.C. tried to go back to sleep, but could not because Hicks came into her room. Hicks knelt on the floor where C.C. was lying with her new puppy, held her hands back, and pulled down her pants. Hicks then forced C.C. to have sexual intercourse with him. After completing intercourse, but before leaving C.C.'s room, Hicks told C.C., "Don't tell nobody or I will hurt you." Tr. p. 54-55. After the attack, C.C. was scared. She cried the entire night, and experienced pain in her vaginal area. Hicks continued to force C.C. to have sexual intercourse with him approximately three times a week until he moved out of the home later that summer.

One night, Hicks entered C.C.'s room as she was getting dressed after taking a shower. Hicks sat down on a chair and made C.C. perform oral sex on him. C.C. complied but bit Hicks's penis hard enough to draw blood. On another night, Hicks entered C.C.'s room and forced her to perform oral sex on him before he had sexual intercourse with her. Hicks ejaculated into a hat and then left C.C.'s room, again

threatening her not to tell anyone or he would hurt her. On another night, Hicks entered C.C.'s bedroom while she slept. C.C. was awakened when Hicks removed the shorts she was wearing, told her to be quiet, and performed oral sex on her. On yet another night, Hicks entered C.C.'s room, touched C.C., placed his finger into her vagina, and again told her to be quiet and not to tell anyone. Each of these attacks occurred while the children were in Hicks's care.

Additionally, one day during the same summer, while T.C. Jr. and C.C. were in Hicks's care, T.C. Jr., C.C., and Hicks were sitting in the living room watching a movie. T.C. Jr. saw C.C. move her hand up and down on Hicks's penis. On another occasion, again while the children were in Hicks's care and were watching a movie in the living room, T.C. Jr. saw C.C. put her mouth on Hicks's penis while Hicks had his pants pulled down. Furthermore, on at least one occasion, while the children were again in Hicks's care, Hicks suggested that they play "strip poker." During one particular game, T.C. Jr. and C.C. "lost" and by the end of the game, T.C. Jr. was wearing only his underwear, and C.C. was completely naked, covering herself with a couch cushion.

Eventually, after T.C. Jr. questioned C.C. about the incidents he had witnessed, C.C. confided in T.C. Jr., telling him everything that Hicks had done to her. C.C. made T.C. Jr. promise not to tell anyone, but he eventually told his father about the incidents. T.C. Sr. questioned C.C., who at first denied the abuse, but then reluctantly admitted to the abuse, telling her father about the incidents. T.C. Sr. immediately notified the police.

On June 5, 2006, Hicks was charged with four counts of child molestation as a Class A felony, one count of child molestation as a Class C felony, one count of sexual

battery as a Class D felony, one count of intimidation as a Class D felony, and one count of neglect of a dependent as a Class D felony. A jury trial was conducted on July 30, 2007. The jury returned guilty verdicts on all eight counts. The trial court sentenced Hicks to a thirty-eight-year executed sentence in the Department of Correction. This appeal follows.

DISCUSSION AND DECISION

A. Sufficiency of Evidence

On appeal, Hicks contends that the evidence was insufficient to support his conviction for neglect of a dependent. Our standard of review for a challenge to the sufficiency of the evidence is well-settled. *Maxwell v. State*, 731 N.E.2d 459, 462 (Ind. Ct. App. 2000), *trans. denied*. When reviewing claims of insufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of the witnesses. *Id*. Rather, we examine only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom. *Brasher v. State*, 746 N.E.2d 71, 72 (Ind. 2001). We will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id*. It is the function of the trier of fact to determine the weight of the evidence and the credibility of the witnesses, and as a result, the jury is "'free to believe whomever they wish.'" *McClendon v. State*, 671 N.E.2d 486, 488 (Ind. Ct. App. 1996) (quoting *Michael v. State*, 449 N.E.2d 1094, 1096 (Ind. 1983)).

To prove the offense of neglect of a dependent, as a Class D felony, the State was required to show that Hicks knowingly or intentionally placed T.C. Jr. in a situation that

might have endangered his life or health. *Cleasant v. State*, 779 N.E.2d 1260, 1262 (Ind. Ct. App. 2002) (citing Ind. Code § 35-46-1-4(a)(1)). The purpose of the neglect statute is to protect a dependent from the failure of those entrusted with his or her care to take the action necessary to ensure the dependent is safe. *Harrison v. State*, 644 N.E.2d 888, 891 (Ind. Ct. App. 1994), *trans. denied*. In *Harrison*, we concluded that the meaning of the word "health," as it relates to the child neglect statute, "is not limited to one's physical state, but includes an individual's psychological, mental and emotional status" and the neglect statute, therefore, applies to not only physical injuries which are inflicted upon children, but also the psychological, mental, and emotional injuries which are inflicted upon children by deviate conduct. *Id*.

Here, both T.C. Jr. and C.C. testified that T.C. Jr. observed his eleven-year-old sister performing sexual acts on Hicks on at least two separate occasions. We believe that a fourteen-year-old child's exposure to an environment where his eleven-year-old sister is forced to engage in sexual acts with a twenty-one-year-old caregiver constitutes an actual and appreciable danger to the child's psychological, mental, and emotional health. *See generally, White v. State*, 547 N.E.2d 831, 836 (Ind. 1989) (holding that the knowing exposure of a dependent to an environment of illegal drug use poses an actual and appreciable danger to that dependent and thereby constitutes neglect). We therefore conclude that Hicks's extreme conduct proved at trial amounted to exposure of T.C. Jr. to unreasonable and prolonged pain and discomfort capable of causing "actual and appreciable" psychological harm. *See Williams v. State*, 829 N.E.2d 198, 201 (Ind. Ct. App. 2005) *trans. denied*.

Additionally, Hicks contends that the evidence was insufficient to support his conviction of neglect of a dependent because the testimony supports a finding that the sexual encounters in question occurred during the day. Therefore, Hicks argues that the record does not support the charge that he engaged in sexual acts with C.C. in T.C. Jr.'s presence during a time when he had assumed care of the children. Appellant's Brief at 7. Hicks's argument is premised on his contention that the evidence establishes that he only assumed care of the children at night. The question, however, is not the time of day when the sexual encounters took place, but rather whether the children were under Hicks's care when the encounters took place.

Both T.C. Jr. and C.C. testified that they were home alone with Hicks when the sexual encounters that occurred in the living room in front of T.C. Jr. took place. Hicks generally denied the allegations levied against him but presented no specific evidence contradicting the children's testimony that they were under Hicks's care when T.C. Jr. observed the sexual encounters between Hicks and C.C. The jury was free to believe the children's accounts surrounding the sexual encounters in question. *See McClendon*, 671 N.E.2d at 488. Hicks's challenge to the sufficiency of the evidence is merely a request to reweigh the evidence and reevaluate the witnesses' credibility, which we will not do. *Harrison*, 644 N.E.2d at 891.

B. Incredible Dubiosity Rule

Hicks next contends that the evidence was insufficient to support all of his convictions because T.C. Jr. and C.C.'s testimony was incredibly dubious and was not supported by any physical evidence. Hicks specifically argues that C.C.'s testimony was

incredibly dubious because her testimony regarding the timing of some of the sexual encounters was inconsistent with a prior statement regarding the timing of some of the sexual encounters and that her testimony is inconsistent as to whether Hicks and C.C. ever engaged in sexual intercourse in T.C. Jr.'s bedroom. Hicks also argues that the children's testimony was incredibly dubious because their testimony was inconsistent with respect to whether Hicks ejaculated in the living room, forcing C.C. to "lick some." Tr. p. 33. The State counters by arguing that the children's testimony was not incredibly dubious, and also that the incredible dubiosity rule does not apply to the facts of this case.

The Indiana Supreme Court has established that the under the incredible dubiosity rule, a defendant's conviction may be reversed "if a sole witness presents improbable testimony and there is a complete lack of circumstantial evidence." *Fajardo v. State*, 859 N.E.2d 1201, 1208 (Ind. 2007). "This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity." *Id*. "Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it." *Id*. More clearly stated, "incredibly dubious or inherently improbable testimony is that which runs counter to human experience, and which no reasonable person could believe." *Campbell v. State*, 732 N.E.2d 197, 207 (Ind. Ct. App. 2000).

Indiana courts have declined to apply the incredible dubiosity rule in situations where the evidence in question is not from a single witness and there is not an absence of circumstantial evidence of guilt. *See Thompson v. State*, 765 N.E.2d 1273, 1274 (Ind.

2002). Moreover, inconsistencies between a witness's pretrial statement and her trial testimony do not make the testimony inherently contradictory and that the incredible dubiosity rule has not been applied where there are inconsistencies between the testimony of witnesses. *Corbett v. State*, 764 N.E.2d 622, 626 (Ind. 2002); *Ferrell v. State*, 746 N.E.2d 48, 51 (Ind. 2001). Finally, in cases involving child molestation, mere inconsistencies in the child's testimony does not necessitate reversal. *Hill v. State*, 646 N.E.2d 374, 378 (Ind. Ct. App. 1995).

In *Fajardo*, the Indiana Supreme Court found "that the testimony of the eleven-year-old witness was not so incredibly dubious or inherently improbable that no reasonable person could believe it" even though "equivocations, uncertainties, and inconsistencies appear." 859 N.E.2d at 1209. The Supreme Court reasoned that the equivocations, uncertainties, and inconsistencies were "appropriate to the circumstances presented, the age of the witness, and the passage of time between the incident and the time of her statements and testimony." *Id*. Likewise, we believe that the inconsistencies in C.C.'s testimony relating to the timing of some of the sexual encounters and the location of every single attack were appropriate given the traumatic nature of the events, her age at the time of the sexual encounters, and the passage of time between the incident and the time of her statements and testimony. Additionally, as in *Fajardo*, here there is clear, unequivocal testimony from C.C. that establishes the necessary elements of the charged offense. *See id*. We therefore decline to invoke the incredible dubiosity rule to impinge on the jury's evaluation of the evidence in this case and conclude from the

evidence that a reasonable trier of fact could have found Hicks guilty beyond a reasonable doubt. *See id*.

The judgment of the trial court is affirmed.

BARNES, J., and CRONE, J., concur.